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Natural Heritage Institute
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Clean Water Action
Mono Lake Committee
Golden Gate Audubon Society
CalTrout
Friends of the River

September 23, 1999

Rick Breitenbach
CALFED Bay-Delta Program
1416 Ninth Street, Suite 1155
Sacramento, CA 95814

Re: Comments on the CALFED Multi-Species Conservation Strategy Technical Appendix

Dear Mr. Breitenbach,

The above organizations submit the following comments on the CalFed Multi-Species Conservation Strategy (MSCS), included as a technical appendix to the draft CalFed Environmental Impact Statement/ Environmental Impact Report (EIS/EIR). Our review focuses primarily on Chapter 7 of the MSCS, regarding compliance with the federal and state Endangered Species Acts (ESA and CESA) and the state Natural Communities Conservation Planning Act (NCCPA).

As discussed below, there are both major and minor structural flaws with the MSCS. Overall, as currently structured, the MSCS will not achieve compliance with the federal and state ESAs. Most fundamentally, the MSCS compliance strategy is not linked to the mandatory species recovery goals of the federal and state ESAs, nor is it adequately coordinated with species recovery goals in the MSCS or recovery plans. Rather, the program is focused on authorizing take, minimizing the impacts of take, and preventing jeopardy to listed species.

In addition, the MSCS places disproportionate emphasis on "streamlining" compliance with the ESA, CESA and NCCPA, authorizing take of listed species under these statutes, and providing assurances to participating entities, while minimizing the need for long term species protection as required under the ESA, CESA and the NCCPA. It is therefore questionable whether the program will even meet the minimum requirements for authorizing incidental take under the ESA, let alone species recovery goals.

What follows are general comments and a section-by-section analysis of the MSCS' ESA, CESA and NCCPA compliance scheme.

I. GENERAL COMMENTS

Because the CalFed Program will be implemented in large part by federal and state agencies, the MSCS must be designed to satisfy the overall goals of the ESA and CESA to recover listed species. Under the ESA and CESA, all federal and state agencies have a mandatory duty to "conserve" listed species. 16 U.S.C. § 1536(a)(1); Fish and Game Code §§ 2052, 2055. Both federal and state law define "conserve" as "the use of, and to use, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," i.e. to the point of full recovery. 16 U.S.C. § 1532(3); Fish and Game Code § 2061.

While the MSCS states that it will either provide for the recovery or "contribute to the recovery" of certain categories of covered species (while merely "maintaining" a third category), the MSCS ESA, CESA and NCCPA compliance strategy is not clearly linked to achieving these overall MSCS goals. Rather, the compliance strategy is focused exclusively on authorizing and mitigating the effects of incidental take of covered species and preventing jeopardy to such species under sections 7 and 10 of the ESA and the state NCCPA. Moreover, the recovery goals of the MSCS are not linked with existing and future species recovery planning efforts under the ESA and CESA, thus potentially creating two competing and possibly conflicting species recovery efforts. The MSCS, in conjunction with the ERP, should function as a recovery plan for all covered, listed species.

In order to meet the requirements of the ESA and CESA, therefore, the MSCS compliance strategy should be clearly linked with the overall MSCS recovery goals and other species recovery efforts under the ESA and CESA.

II. SECTION-BY-SECTION COMMENTS

A. Sections 7.1 and 7.2: Programmatic ESA, CESA, and NCCPA compliance and ESA, CESA and NCCPA Compliance for Individual Actions

The MSCS states that it will serve as the biological assessment for the CalFed program, in support of programmatic ESA section 7 consultations to be prepared by the U.S. Fish and Wildlife Service (USFWS) and National Marine Service (NMFS) on the entire CalFed program. The MSCS also will double as a "programmatic" natural communities conservation plan (NCCP) under the NCCPA.

Neither the MSCS nor the programmatic biological opinions will themselves authorize take of MSCS covered species. Rather, the MSCS will serve as the basis for Action Specific Implementation Plans (ASIPs) prepared for each CalFed program action. These ASIPs will be tiered off of, and based in large part on, the biological data, CalFed program information, impact analysis and conservation measures in the MSCS. The USFWS and NMFS will issue a project-level biological opinion and incidental take statement under section 7 and/or an incidental take permit under section 10 for each ASIP under the ESA. In addition, the Department of Fish and Game (DFG) will issue a Fish and Game Code section 2835 permit for each ASIP under the NCCPA. DFG will only issue CESA section 2081 take permits for species that are *not* on the MSCS covered species list.

We have several serious concerns about this streamlined regulatory approach to compliance with federal and state endangered species laws.

1. The MSCS Contains Inadequate Biological Information for Tiering of ASIPs.

First, the MSCS does not clearly indicate how and to what extent it will be used to support subsequent CalFed program actions. This is important because the MSCS is extremely vague and general and cannot serve as an adequate basis, standing alone, for issuance of take authorization under the federal and state ESAs for individual program actions. Importantly, the MSCS itself recognizes that it lacks critical information necessary for informed decisionmaking under the endangered species laws. *See* p. 7-2 ("[i]n most cases, additional information will be required for the Wildlife Agencies to ascertain a CalFed program action's specific impacts on species to the extent required by the ESA, CESA and the NCCPA").

However, the MSCS fails to indicate what specific actions will require further biological analysis and information in the ASIPs and what actions will not. *See* MSCS p. 7-8 ("[a]dditional information and analysis will be required for *many* Program actions"). Nor does it indicate how much and precisely what kind of additional information (e.g. population surveys) will be needed in an ASIP in order to implement a CalFed program action. It therefore is impossible to determine, based on the MSCS, exactly what level of biological review each CalFed program action will receive under the MSCS and an ASIP tiered off of the MSCS.[1]

More troubling though, are conflicting statements elsewhere in the MSCS about whether subsequent biological analysis will even be required *at all* in an ASIP. *See, e.g.*, p. 7-8 ("[t]he MSCS has reduced the potential for an implementing entity to be required to provide additional program information, impacts analysis, and conservation measures, by offering as much detail as is feasible on the expected impacts of program actions on species and habitats and the expected conservation measures for those impacts"); p. 7-2 ("[t]he subsequent compliance process for *some* Program actions *may* be complete *shortly* after CALFED issues the ROD and makes findings of fact for the CALFED program, depending upon the level of detail available about each action and its environmental effects").

Given how inadequately defined the CalFed program actions are, and the corresponding lack of detailed environmental analysis in the draft EIS/EIR, the prospect that even *some* program actions will not receive more detailed analysis in an ASIP and project-specific biological opinion is legally problematic. Absent additional biological analysis in each ASIP, the streamlined ESA compliance procedure in the MSCS means that biological opinions could be issued, and CalFed programs implemented, on the basis of little or no basic biological

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[1] The MSCS states that CalFed is developing a coordinated environmental review and permitting process for program actions, which will include the MSCS' streamlined procedure for compliance with the ESA, CESA and NCCPA. This process is a critical part of the entire CalFed program, and should not be developed after the fact but rather should be prepared now and circulated for public review and comment.

information. This lack of biological information then would be compounded by the level of regulatory assurances being provided to participating entities (see below).

Under these circumstances, it will be impossible for federal agencies to meet their obligations under section 7 to conserve listed species, and to ensure that their actions are not likely to jeopardize the continued existence of listed species and are not likely to adversely modify or destroy designated critical habitat. It will also be impossible for the USFWS and NMFS to meet their legal obligations under section 10 to ensure that the level of take authorized in an incidental take permit will be minimized and mitigated to the maximum extent practicable, and will not appreciably reduce the likelihood of species survival and recovery in the wild. Likewise, DFG will be unable to meet its obligations to conserve listed species under CESA and to ensure that the statutory criteria for issuance of incidental take permits are met.

The MSCS therefore must be revised to require additional biological analysis in each ASIP, as necessary to meet the requirements of the ESA and CESA. The level of additional analysis required should be based on guidance governing preparation of project-specific environmental documents which are tiered off program-level environmental documents under National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA). Under this approach, the project-level document will incorporate by reference relevant *overall* analysis from the program-level document, while analyzing the site-specific impacts of the project in detail.

2. DFG Must Issue Incidental Take Permits for ASIPs Under CESA, Not the NCCPA.

In addition to inadequate biological information, the MSCS violates CESA because it states that take will be authorized under the NCCPA, not CESA, for all CalFed program actions that may affect MSCS covered species. The NCCPA does not authorize DFG to permit incidental take of CESA-listed species independent of CESA. To the contrary, section 2835 of the Fish and Game Code states that DFG "may permit the taking, *as provided in this code*, of any *identified* species whose conservation and management is provided for" in a DFG-approved NCCP. Thus, the incidental taking of any CESA-listed species identified in an NCCP must be authorized as provided for by CESA. Under section 2081 of CESA, DFG may permit the incidental take of candidate, threatened and endangered species under CESA if certain requirements are met. Fish and Game Code § 2081.

The NCCPA itself recognizes that NCCPs that cover state listed species must be permitted under section 2081 of CESA. *See* Fish and Game Code § 2825(c) (NCCPs "shall be implemented pursuant to Section 2081"). In San Bernardino Valley Audubon Society v. Metropolitan Water District, Riverside Sup. Ct. Case No. 274844, affd. on other grounds, __ Cal. App. 4th __ (1999), the Riverside County Superior Court interpreted this language. The court held that "the NCCP Act does not provide independent authorization for incidental 'take' for development purposes, but instead refers back to CESA and to section 2081 [of the Fish & Game Code]." (Decision on Pet. for Writ of Mandate, at 4.)

Thus, the MSCS must be revised to require take of CESA-listed species to be authorized only under that statute.

3. The MSCS Contains Inadequate Provision for Public Review of and Comment on ASIPs.

It is unclear whether the ASIPs will be made available for public review and comment under the federal and state ESAs, NEPA and CEQA. The MSCS states that most ASIPs will be analyzed and permitted under section 7 of the ESA rather than section 10. Only CalFed program actions that are not authorized, funded or carried out by a federal agency will be permitted under section 10. Section 7, however, does not include any mechanism for public review of draft biological opinions, whereas the section 10 permitting process includes a thirty day public comment period on an incidental take permit application and also requires review under NEPA.

Because ASIPs will provide the mechanism through which specific program actions will be implemented and take of listed species will be authorized, it is imperative that ASIPs be circulated for public review and comment prior to their adoption. In addition, because a public agency's preparation and approval of an ASIP, and the Wildlife Agencies' issuance of take permits for such plan qualify as "major federal actions" under NEPA and "projects" under CEQA, these plans are subject to environmental review under NEPA and CEQA.

B. Section 7.3: Covered Species

1. Definition of Covered Species

The definition of "covered species" is inconsistent with the MSCS' goals. The MSCS states that its goals are to recover, contribute to recovery of, or maintain the species evaluated in the MSCS. However, the MSCS and Phase II Report also state that species may be included on the covered species list if they are "protected from jeopardy." Under the Wildlife Agencies' current interpretation of the jeopardy standard, a species may be "protected from jeopardy" even if its population is declining. This is not consistent with a species recovery objective. Therefore, the MSCS covered species list should only include those species for which the MSCS will ensure or contribute to its recovery.

2. Modifications to Covered Species List

In addition, we strongly object to the limitations on including additional mitigation measures in the MSCS or in an ASIP when an unlisted species is added to the covered species list. The MSCS indicates that if a species is proposed for listing that is not a covered species, the wildlife agencies will first determine whether additional conservation measures beyond the MSCS are necessary to conserve the species. If not, the species will be added to the covered species list and take of such species will be authorized pursuant to the ASIPs. If additional measures are determined to be necessary, the Wildlife Agencies must, where possible, "give preference to measures that do not increase" or "do not require further" restrictions on the use of land or water. MSCS, p. 7-15.

This limitation on additional mitigation measures is biologically unwarranted and legally unjustified. Nothing in the ESA, CESA or NCCPA authorizes the Wildlife Agencies to limit

the nature and extent of the additional measures necessary to ensure conservation of species subsequently included on the covered species list. In fact, to the contrary, the Wildlife Agencies cannot include a species on the covered species list (and thereby authorize issuance of take permits for such species), unless the take will be minimized and fully mitigated, and the amount of the authorized take will not jeopardize the continued existence of the species, among other things. 16 U.S.C. §§ 1536(a)(2), 1539(a)(2)(B); Fish and Game Code § 2081(b) & (c). If the MSCS does not adequately provide for the species' conservation, the Wildlife Agencies must impose *any and all* additional mitigation measures necessary to meet the statutory criteria for issuance of take permits under the ESA and CESA. This may require additional restrictions on the use of land or water, depending upon the biological needs of the species at issue.

C. Section 7.4: Implementation

The MSCS contains no mechanism to ensure that individual program actions will in fact be implemented. This renders the program legally vulnerable, since the MSCS programmatic biological opinions will be premised on the assumptions that all program actions will be implemented and that the program *as a whole* will provide benefits to species. However, if certain portions of the program are not implemented (e.g. portions of the Environmental Restoration Program - ERP), the assumption that the program will provide overall benefits to covered species collapses, thereby undermining the entire basis for the "no jeopardy" programmatic biological opinions.

1. Implementing Entities

The MSCS states that "[a]t this time, it is not possible to precisely identify what agency or other entity will implement each of the Program actions and measures in the MSCS." MSCS, p. 7-15. This is absurd. At a minimum, the MSCS can and should identify what agency or group of agencies is likely to implement each of the program actions and MSCS conservation measures. Absent this information, the success of the program cannot be evaluated.

2. Linked Actions

When evaluating "linked actions" (e.g. conveyance actions implemented simultaneously with ERP actions), the MSCS states that the Wildlife Agencies will make their determinations under the ESA, CESA and NCCPA "based on their overall beneficial and detrimental impacts to the covered species, rather than the impacts of each action individually." MSCS, p. 7-17. The MSCS states that the purpose of this approach is to "further streamline the compliance process for those Program actions that are complementary from a biological standpoint." *Id.*

This streamlined approach to evaluating linked actions is inappropriate under the ESA and CESA, which require the biological impacts of each program action to be analyzed separately and comprehensively (though all such analyses could be in a single document). While the species benefits of one program action may in fact "cancel out" or mitigate for the detrimental impacts of another program action, this determination cannot be made accurately or objectively absent separate evaluation of each program action. Individual analysis of program actions is also important because there may be circumstances in which "linked actions" are not actually implemented simultaneously.

More fundamentally, linkage of restoration and conveyance actions has the potential to greatly distort ecosystem restoration priorities in the ERP and nullify recovery objectives of the ERP and MSCS. If a "no jeopardy" biological opinion is issued for the ERP or component thereof, this opinion must be predicated upon the program's ability to achieve species recovery objectives, not on its neutral effect when implemented in conjunction with water development projects.

3. Assurances

a. **Providing assurances for federal and state agencies is legally and biologically inappropriate.**

The MSCS implies that regulatory assurances would be provided to federal and state agencies implementing CalFed program actions. *See* MSCS p. 7-19 (the MSCS includes in the streamlined permitting process "a means by which assurances can be provided to CalFed agencies and entities" implementing program actions "that the conservation measures approved by the Wildlife Agencies for covered species will not be substantially increased or altered over time" and "[t]he Wildlife Agencies will provide appropriate assurances regarding each CalFed Program action directly to the CalFed agency or other entity carrying out the program action"). We strongly object to CalFed providing such assurances, for several reasons.

First, providing regulatory assurances to federal and state agencies is illegal. It is wholly inconsistent with the agencies' mandatory recovery obligations under the ESA and CESA. Under the ESA and CESA, all federal and state agencies have a duty to "conserve," i.e. recover, listed species. 16 U.S.C. § 1536(a)(1); Fish and Game Code §§ 2052, 2055. However, if federal and state agencies' responsibilities to implement additional CalFed program conservation actions is limited by assurances, this unlawfully circumscribes their mandatory duty to recover species. For the same reasons, federal agency assurances are inconsistent with their duty under section 7(a)(2) of the ESA to ensure no jeopardy and no adverse modification of critical habitat.

The MSCS also cannot legally authorize biological opinions to limit federal agencies' duty to reinitiate consultation under the ESA. Federal regulations currently require consultation to be reinitiated whenever a new species is listed or critical habitat is designated within an area affected by the federal action. 50 C.F.R. § 402.16. The MSCS unlawfully attempts to override this federal regulation by allowing program-specific biological opinions to authorize take of unlisted, covered species automatically (if and when they are listed) without reinitiating consultation at that time. MSCS p. 7-20.

Second, even assuming *arguendo* that providing regulatory assurances to federal and state agencies is legal, it is biologically unjustifiable. Such assurances unnecessarily lock current program mitigation measures into place and seriously reduce the CalFed program's ability to respond meaningfully to changed circumstances and new information through adaptive management. Such assurances could undermine the success of the entire program by severely limiting federal and state agencies' legal obligation to respond to declines in species populations if current program actions prove to be unsuccessful or inadequate to achieve species recovery goals. Since federal and state agencies are the ultimate backstop in ensuring that the overall goals of the

ESA and CESA are met, if their obligation to protect species is limited, *there will be no further recourse for species protection under the law.*

Third, such assurances are wholly inappropriate and unnecessary from a policy standpoint. Federal and state agencies are already legally obligated to provide for species recovery. Thus, there is no legal, practical, or other reason to provide them with "incentives" (in the form of regulatory assurances) to undertake species recovery measures. Indeed, the very concept of providing assurances to federal and state agencies is unprecedented and absurd.

b. "Safe harbor" type assurances for cooperating landowners are overbroad and poorly defined.

We also strongly object to the blanket "safe harbor" program for all cooperating landowners, *including public entities.* The safe harbor program in theory holds some promise for improving landowner incentives for species protection in limited circumstances on *private lands.* Nevertheless, the program is highly experimental, and must be carefully tested on a case-by-case basis. The program is fraught with potential biological pitfalls, such as the "biological sink" problem, inadequate baseline surveys, inadequate monitoring of actions that may cause populations to fall below baseline levels, etc. It is therefore extremely inappropriate for the MSCS to suggest that some kind of safe harbor protection will be provided for all cooperating landowners, particularly public agencies. Such blanket protection could undermine the benefits of the entire ERP, for example, by allowing water diverters to bring species down to *zero baseline* levels "in streams or rivers newly opened to anadromous fisheries" or any number of other specified circumstances.

Moreover, the cooperating landowner assurance program, as defined, is unnecessarily vague. The program states that it is intended to preserve "compatible land uses" "where appropriate," but fails to specify when preservation of such uses would be deemed appropriate. The program goes on to list a wide variety of broadly-applicable circumstances under which assurances might be given to cooperating landowners (e.g. routine and ongoing agricultural activities), but does not include any conditions or limitations on granting such assurances. In addition, it is difficult to imagine how federal and state agencies will be mandated to implement additional mitigation measures to compensate for the impact of providing broad landowner assurances, when the agencies themselves will have their own assurances that they will *not* be required to undertake further mitigation.

Finally, the cooperating landowner assurances fail to account for species recovery goals in the ESAs and MSCS. "Compatible land uses" for which assurances are available are defined as those that "will not *degrade* existing environmental conditions for covered species." MSCS p. 7-22. This creates a situation in which the entire burden of meeting ESA and MSCS goals could fall on federal and state agencies, a problem which will be severely compounded by providing these agencies with their own assurances!

4. Funding

Pursuant to section 10 of the ESA and section 2081 of CESA, funding for implementation of MSCS conservation measures, and for monitoring compliance with and the

effectiveness of such measures, *must be* assured. 16 U.S.C. § 1539(a)(2)(B)(iii); Fish and Game Code § 2081(b)(4).

III. CONCLUSION

In sum, the MSCS contains numerous legal deficiencies that must be remedied in order to ensure that the MSCS is not vulnerable to legal challenge. We strongly urge the CalFed agencies to make the revisions suggested herein and to recirculate this document for public review and comment. Thank you.

Sincerely,

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Natural Resources Defense Council

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The Bay Institute of San Francisco

Greg Thomas
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September 23, 1999

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Re: **Supplemental Comments on the Revised CALFED Draft Programmatic EIS/EIR**

Dear Mr. Breitenbach,

The above organizations submit these supplemental comments on the draft CalFed Programmatic Environmental Impact Statement/Environmental Impact Report (EIS/EIR) regarding the document's adequacy under the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). Some of our organizations have submitted separate comments regarding these documents.

I. GENERAL COMMENTS ON PROGRAM EIS/EIR

A. Basic Standards of Adequacy for a Program EIS/EIR

1. CEQA

Under the CEQA Guidelines, the purposes of a program EIR are to:

1) Provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action;

2) Ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis; and

3) Allow the lead agency to consider broad policy alternatives and programwide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts. 14 Cal. Code Regs. § 15168(b).

A program EIR should provide the basis for determining in an initial study whether a subsequent activity may have a significant environmental effect. 14 Cal. Code Regs. § 15168(d)(1). It should also consider "regional influences, secondary effects, cumulative impacts,

broad alternatives and other factors that apply to the program as a whole." 14 Cal. Code Regs. § 15168(d)(2). Finally, a program EIR should contain a comprehensive enough analysis to allow a subsequent project-specific EIR to focus only on the significant new environmental effects caused by the project. 14 Cal. Code Regs. § 15168(d)(3). Accordingly, the CEQA Guidelines state that a program EIR should "deal with the effects of the program as specifically and comprehensively as possible." 14 Cal. Code Regs. § 15168(c)(5).

2. NEPA

The NEPA Guidelines direct federal agencies to prepare program EISs on "broad federal programs such as the adoption of new agency programs or regulations." 40 C.F.R. § 1502.4(b). A program EIS should analyze the broad environmental consequences of a program that covers a wide range of activities. National Wildlife Federation v. Appalachian Regional Comm'n, 677 F.2d 883, 888 (D.C. Cir. 1981). "The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts. This relationship is expressed in terms of `cumulation' of impacts or `synergy' among impacts that are caused by or associated with various aspects of one big federal action." *Id.* The program EIS "looks ahead and assimilates broad issues relevant to one program design." *Id.*

As under CEQA, subsequent, project-specific EISs may be tiered onto a program EIS "to eliminate repetitive discussions of the same issues" and to "focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. §§ 1500.4(j), 1502.20. "Tiering" is defined as the "coverage of general matters in a broader EIS . . . with subsequent narrower statements . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. §§ 1508.28, 1502.20.

B. CalFed Program EIS/EIR

In general, the CalFed program EIS/EIR needs to include a more comprehensive consideration of broad program effects, as required by the NEPA and CEQA regulations. This includes discussion of "regional influences, secondary effects, cumulative impacts, broad alternatives and other factors that apply to the program as a whole." 14 Cal. Code Regs. § 15168(d)(2). As written, the document is far too vague and general and provides little useful information for effectively evaluating the myriad environmental impacts of the CalFed program. As such, the document is inadequate to serve its purpose as a basis for future decisionmaking and as a foundation upon which subsequent environmental analysis can tiered.

The EIS/EIR also must contain a specific description of the subsequent environmental review process for program implementation actions. The document generally states that subsequent program actions and facility construction stemming from the programmatic actions "must be developed in compliance with NEPA [and] CEQA." EIS/EIR, p. iv; *see also* p. 1-19. However, the document does not explain how the subsequent environmental review process will function, leaving this critical NEPA/CEQA compliance issue wide open.

The EIS/EIR should include a procedure for environmental review and permitting of CalFed program implementation actions. This procedure should indicate what types of program actions will require tiered, project specific EIS/EIRs; what actions will be considered

categorically exempt or categorically excluded from CEQA and NEPA; and what actions will require a negative declaration, mitigated negative declaration, or finding of no significant impact (FONSI) or mitigated FONSI under CEQA and NEPA. This information is critical to evaluating the success of the CalFed program, since all of the concrete, site-specific environmental analysis necessary to program implementation will be conducted during the subsequent phases of environmental review.

I. PROJECT DESCRIPTION

A. CEQA and NEPA Requirements

CEQA requires an EIR to include a complete and accurate project description. The project description must include: (1) the precise location and boundaries of the proposed project depicted on a detailed map, preferably topographic; (2) a statement of the project's objectives; (3) a general description of the project's technical, economic, and environmental characteristics; and (4) a statement regarding the intended uses of the EIR. 14 Cal. Code Regs. § 15124. An inaccurate, misleading, or curtailed project description prevents the public and the decisionmaking agency from adequately evaluating this project's environmental effects. *See* County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 192-193 (1977) (an "accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient" environmental analysis). NEPA likewise requires an EIS to include a statement of the project's purpose and need. 40 C.F.R. § 1502.13.

B. CalFed Program EIS/EIR

The project description in the EIS/EIR is too general to meet CEQA's requirement for a "complete and accurate" project description and NEPA's project "purpose and need" requirement. The document never describes precisely what actions will be undertaken under each of the eight program elements and three program alternatives, and in what geographic locations these actions will be taken. The program elements and alternatives are described in only the most general terms, making it extremely difficult to effectively evaluate the comparative environmental consequences of these actions.

III. ENVIRONMENTAL IMPACT ANALYSIS

A. Applicable Legal Standards for Impact Analysis and Mitigation

1. CEQA

CEQA requires an EIR to clearly identify and describe the direct and indirect environmental effects[1/] of the project, considering both short term and long term effects. The discussion must include:

[1/] A significant environmental effect is defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects historic or aesthetic significance." 14 Cal. Code Regs. § 15382; *see also* Cal. Pub. Res. Code § 21068.

> the relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution [and] concentration, human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resources base such as water, scenic quality, and public services.

14 Cal. Code Regs. § 15126.2(a).

An EIR also must analyze the cumulative impacts of the project under consideration when added to other closely related past, present and reasonably foreseeable future projects. 14 Cal. Code Regs. § 15130. "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." 14 Cal. Code Regs. § 15355. Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time." *Id.*

The fact that a project or an aspect of a project may, in and of itself, have a relatively minor impact does not mean that the project will not have significant cumulative impacts. *See* Kings County Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 722 (1991). Such a conclusion was expressly repudiated by the court in EPIC v. Johnson, 170 Cal. App. 3d 604, 624-625 (1985):

> To address the cumulative effect issue the Department has taken the tact [sic] that if the adverse effects are minimized to the maximum [extent feasible] on each individual operation, then the total effect on the surrounding area will also be minimized to an acceptable level. This statement is at odds with the concept of cumulative effect, which assesses cumulative damages as a whole, greater than the sum of its parts.

An adequate cumulative impact analysis under CEQA must summarize all past, present and probable future projects (including projects outside of the agency's control). 14 Cal. Code Regs. § 15130(b)(1). The projects discussed must include not only approved projects but projects currently undergoing environmental review. *Id.* Further, the EIR must contain a summary and "reasonable analysis" of the anticipated environmental effects of the these projects, with "specific reference[s] to additional information" and state where that information is available. 14 Cal. Code Regs. § 15130(b)(2); *see also* Kings County Farm Bureau v. City of Hanford, 221 Cal. App. 3d at 729 (holding that cumulative impact analysis must be supported by at least some hard data). Although the discussion need not be as detailed as the discussion of direct impacts of the project, it must be more than a mere conclusion "devoid of any reasoned analysis." Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 411 (1979).

Finally, CEQA also requires an EIR to include measures to avoid or minimize *each* significant impact identified, including cumulative impacts and the impacts of alternatives. 14 Cal. Code Regs. § 15126.4(a), 15130(b)(3). The discussion must distinguish between measures proposed by the project proponent and those proposed by lead, responsible and trustee agencies. 14 Cal. Code Regs. § 15126.4(a). Where several measures are available to mitigate an impact,

each should be discussed and the basis for selecting a particular measure identified. If a mitigation measure would cause one or more significant impacts in addition to those of the proposed project, these impacts must be discussed as well. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. *Id.*

2. NEPA

NEPA regulations require an EIS to "provide a full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. NEPA regulations require an EIS to include a discussion of direct and indirect impacts of the project and mitigation measures for any significant effects identified. 40 C.F.R. § 1502.16(a), (b), (h); 1502.14(f). "Direct effects" are those which are immediately caused by the action. "Indirect effects" are those which will be caused by the action at a later time, but which are nevertheless reasonably foreseeable. 40 C.F.R. § 1508.8. They include growth inducing effects and other effects related changes in land use patterns. 40 C.F.R. § 1508.8(b). The discussion of impacts must also include an analysis of possible conflict between the proposed action and federal, state, regional and local land use plans and policies. 40 C.F.R. § 1502.16(c).

In addition, an EIS must analyze "cumulative actions, which when viewed together have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(2). Thus, "[w]here several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS." Resources Ltd. v. Robertson, 35 F.3d at 1306; *see also* 40 C.F.R. § 1508.25(a)(3). "Cumulative impact" is defined in the NEPA regulations as the impact on the environment that results from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Thus, a federal agency cannot ignore significant impacts by considering the environmental effects of individual projects in isolation from past and reasonably foreseeable future projects. Inland Empire Public Lands Council, 992 F.2d at 981.

Finally, NEPA requires an EIS to include measures to avoid or minimize *each* significant impact identified, including the impacts of alternatives. 40 C.F.R. § 1502.16(h), 1502.14(f), 1508.25. An EIS also must examine "reasonable options" for avoiding or mitigating any significant cumulative effects identified. 40 C.F.R. § 1508.25.

The analysis of environmental impacts must satisfy a "rule of reason" which requires a "reasonably thorough" discussion of impacts and mitigation measures. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989).

B. CalFed EIS/EIR

The CalFed EIS/EIR fails to meet the above legal requirements for impact analysis and mitigation. For example, several programmatic level decisions that are critical to implementing the Preferred Alternative are not analyzed at all in the EIR/EIS. Instead, they are improperly deferred until a future date. Examples of major deferred decisions include the thirty year governance structure, financing and cost-sharing package, and assurances package. This is wholly inappropriate under CEQA. *See* Stanislaus Natural Heritage Project v. County of

Stanislaus, 48 Cal. App. 4th 182 (1996) (holding that program EIR for phased development project was inadequate because it deferred consideration of water source for the project until subsequent phases of environmental review). Moreover, the document fails to describe how deferred decisions will be made.

The EIS/EIR also fails to accurately and comprehensively describe the direct, indirect and cumulative impacts of a variety of program actions, such as the construction and operation of new storage facilities (and how this will adversely impact implementation of the ERP), construction of the Hood diversion facility; flood control reservations, evaporative losses, etc. Nor does the document adequately evaluate the potential failure to assure implementation of the ERP. For further discussion of the issue areas that are not adequately evaluated in the EIS/EIR, see NRDC comments and attachments thereto (including comments submitted on the July 1998 draft EIS/EIR), submitted herewith.

In addition, for a programmatic level document, the discussion of cumulative impacts of the program as a whole is highly inadequate. Although we applaud the acknowledgment that significant adverse cumulative effects would occur, the document contains mere conclusions "devoid of reasoned analysis." Whitman, 88 Cal. App. 3d at 411. The EIS/EIR states that "[b]ecause of the preliminary phase of most of the projects (environmental reviews have not been initiated, drafted or finalized), comparable environmental information for identifying cumulative impacts was not available." EIS/EIR, p. 3-6. The lack of project-specific environmental analysis however, does not excuse the lead agencies from analyzing the cumulative impacts of CalFed program elements in this document. To the contrary, one of the primary purposes of preparing a programmatic level environmental document is to enable the decisionmakers and the public to assess the cumulative effects of program implementation at an early stage when these impacts can be rectified through alternative program design. National Wildlife Federation v. Appalachian Regional Comm'n, 677 F.2d 883, 888 (D.C. Cir. 1981); 14 Cal. Code Regs. § 15168(b).

IV. ALTERNATIVES ANALYSIS

A. Applicable Legal Standards

1. CEQA

CEQA requires EIRs to describe and evaluate the "comparative merits" of a reasonable range of feasible alternatives to the proposed project and/or to the *location of the project*. 14 Cal. Code Regs. § 15126.6(a). The alternatives selected for analysis must focus only on those that would avoid or substantially reduce the project's significant environmental effects, *even if these alternatives would impede to some degree the attainment of project objectives or would be more costly.* (14 Cal. Code Regs. § 15126.6(a), (b), (f).) The range of alternatives selected must "foster informed decisionmaking and public participation." 14 Cal. Code Regs. § 15126.6(a), (f). One of the alternatives analyzed must include the "no project" alternative. 14 Cal. Code Regs. § 15126(e). The purpose of the no project alternative is to allow decisonmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project. *Id.*

The EIR must describe the rationale for selecting the alternatives to be discussed, and identify any alternatives that were rejected as infeasible during the scoping process and why. 14 Cal. Code Regs. § 15126.6(a), (c). The EIR's alternatives analysis must include "sufficient information about each alternative to allow *meaningful* evaluation, analysis and comparison with the proposed project." 14 Cal. Code Regs. § 15126.6(d) (emphasis added).) If an alternative would cause one or more significant effects in addition to the proposed project, the EIR must evaluate these impacts but in less detail than those of the proposed project. *Id.* Finally, the analysis must select an "environmentally superior" alternative. (14 Cal. Code Regs. § 15126.6(e)(2). If the "no project" alternative is environmentally superior, the EIR must select another alternative as environmentally superior. *Id.*

2. NEPA

NEPA regulations require the EIS to "rigorously explore and objectively evaluate all reasonable alternatives," and to explain why alternatives not analyzed were eliminated from detailed consideration. 40 C.F.R. § 1502.14(a). Consideration of alternatives is the "heart" of an EIS. 40 C.F.R. § 1502.14. The EIS must therefore "devote substantial treatment to each alternative considered in detail so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(b). It also must explain how each alternative will or will not achieve the policies of NEPA and other relevant environmental laws and policies. 40 C.F.R. § 1502.2(d). The analysis must include the alternative of no action, as well as alternatives not within the federal lead agency's jurisdiction. 40 C.F.R. § 1502.14(c), (d). Finally, the analysis must identify the agency's preferred alternative and include appropriate mitigation measures for each alternative analyzed in detail. 40 C.F.R. § 1502.14(e), (f).

The adequacy of an EIS' discussion of alternatives is determined by a "rule of reason." There is no minimum number of alternatives that must be discussed. Laguna Greenbelt v. U.S. Dep't of Transp., 42 F.3d 517, 524 (9th Cir. 1994). However, the existence of a viable but unexamined alternative renders the EIS inadequate. Mumma, 956 F.2d at 1519. An EIS will generally be held adequate if it evaluates a "reasonable range" of alternatives. The range is dictated by "nature and scope of the proposed action," and must be sufficient to permit the agency to make a "reasoned choice." Alaska Wilderness Recreation and Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995).

B. CalFed EIS/EIR

The EIS/EIR fails to analyze a reasonable range of alternatives under CEQA and NEPA. The EIS/EIR fails to adequately explore alternative means of achieving the ecosystem restoration objectives of the CalFed program, within the confines of the common program elements. In addition, while the level of environmental restoration remains the same under each alternative, there is no alternative that seriously considers reduced exports from the Delta. The EIS/EIR states that "although program elements common to all alternatives would improve and increase aquatic habitat and improve ecological processes in the Bay-Delta," implementation of the conveyance element would have significant and unavoidable impacts under all alternatives. EIS/EIR, p. 6.1-57. The EIS/EIR must explore reasonable alternatives for avoiding or reducing these impacts.

In addition, as a related point, each of the alternatives analyzed in the EIS/EIR has *greater* adverse environmental impacts than the Preferred Alternative. This is inconsistent with CEQA and NEPA, which require an EIS/EIR to consider only those alternatives that are capable of reducing the proposed action's significant environmental effects.

In addition, the No Project/No Action alternative relies on an outdated and flawed 1995 baseline (using DWR's Bulletin 160-93) and speculative assumptions (e.g. implementation of the Monterey Agreement, the validity of which is currently being litigated and certain SWRCB actions). The effect of these flaws is that the EIS/EIR overstates the demand for south of Delta exports, and fails to discuss the benefits to agriculture of receiving the re-directed water. This is inconsistent with the CEQA Guidelines, which require the no project alternative to discuss the conditions existing at the time the notice of preparation is published, as well as "what would *reasonably* be expected to occur in the foreseeable future if the project were not approved." 14 Cal. Code. Regs. § 15126.6(e)(2). The means that the no project alternative may not, as the EIS/EIR does here, rely on outdated baseline information, nor may it rely on speculative assumptions about potential future actions.

The No Project/No Action alternative is bifurcated into a so-called "reduced demand" alternative and a "100% contract deliveries" alternative. It is unclear whether the "reduced demand" alternative equates with reduced pumping from the Delta. If not, then the core underlying assumption for the No Project/No Action alternative is 100% contract deliveries, which skews the entire analysis. The EIS/EIR uses the level of export pumping as the primary measure of success in achieving the goal of reducing conflicts in the system, and evaluating the comparative merits of the other alternatives.

The EIS/EIR also fails adequately to compare the No Project/No Action alternative with existing conditions. The two are not one and the same. *See* 14 Cal. Code Regs. § 15126.6(e). In some places, the EIS/EIR states that there are few differences between the No Project alternative and existing conditions. However, in other places, the document concedes that increased pumping could range from 370 TAF to over 1 MAF (pp. 5-3 - 5-21) above current levels of pumping. This major discrepancy is not adequately addressed in the EIS/EIR.

V. CONCLUSION

In sum, the EIS/EIR fails to meet basic requirements of adequacy under NEPA and CEQA. The document does not:

- meet basic requirements for a program EIS/EIR;
- include a sufficiently comprehensive project description;
- contain an adequate discussion of direct, indirect and cumulative impacts of each program element and action, nor does it contain a sufficient discussion of the cumulative impacts of the program as a whole;
- analyze a reasonable range of alternatives that will avoid or minimize the program's significant environmental effects, and contains a flawed no project alternative.

The EIS/EIR therefore must be revised to address these issues. Thank you for your consideration of our views.

Sincerely,

Drew Caputo
Natural Resources Defense Council

Gary Bobker
The Bay Institute of San Francisco

Jackie McCort
The Sierra Club

Marguerite Young
Clean Water Action

Fran Spivy-Weber
Mono Lake Committee

Arthur Feinstein
Golden Gate Audubon Society

Nick DiCroce
CalTrout

Betsy Reifsnider
Friends of the River